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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5903

McARTHUR CORBITT,

Appellant,

v.

STATE OF NEW JERSEY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF FOR APPELLANT

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Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: McArthur Corbitt v. New Jersey
No. 77-5903

Dear Mr. Rodak:

In reviewing my brief in the above case I found that on page 15 I had inadvertently misquoted the opinion of the Supreme Court of New Jersey to the effect that "...encouragement of guilty pleas is at the very heart of an effective plea negotiation program." The actual quote should read as follows:

> ...encouragement of guilty defendants not to contest their guilt is at the very heart of an effective plea negotiation program.

I would appreciate it very much if you would advise the Court of this correction and convey my sincere apologies for this mistake.

Sincerely,

James K. Smith

JAMES K. SMITH, JR.
Assistant Deputy
Public Defender

JKS/lgr
cc: Attorney General

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division, entered on September 23, 1975, is unpublished. A copy of that opinion is included in the printed Appendix at A. 9.

The opinion of the Supreme Court of New Jersey, announced on October 6, 1977, is reported at 74 N.J. 379, 378 A.2d 235 (1977). A copy of that opinion is set forth in the Appendix at A. 14.

JURISDICTION

At his sentencing and on appeal defendant Corbitt challenged the constitutionality of the sentencing provisions of the New Jersey murder statute, *N.J.S.A.* 2A:113-1 to 4. The Supreme Court of New Jersey specifically held the statute to be valid, ruling that it did not violate either the Fifth, Sixth, or Fourteenth Amendments to the United States Constitution. Jurisdiction in this case is conferred by Title 28, United States Code, §1257(2). *Cohen v. California*, 403 U.S. 15, 17 (1971).

QUESTIONS PRESENTED

1. Whether the New Jersey murder statute, which imposes a mandatory life sentence on defendants convicted of felony murder after a jury trial, but which allows defendants who do not contest their guilt to be sentenced to a term of years, served to penalize the exercise of the appellant's Fifth and Sixth Amendment rights to a jury trial.

2. Whether, consistent with the Equal Protection Clause, a state may enact a statute which provides separate scales of punishment for those persons who plead to an offense as opposed to those persons who are convicted after a jury trial.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

At issue in this appeal is the constitutionality of *N.J.S.A.* 2A:113-1 to 4 which is set forth in full in the printed

appendix at A. 3. Relevant constitutional provisions involved are the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, all of which are set forth in an addendum to this brief.

STATEMENT

Defendant Corbitt was indicted for two counts of arson and one count of murder as a result of two fires in an apartment building in Newark, New Jersey. At a jury trial in the Superior Court of New Jersey, Law Division, Essex County, defendant was convicted of one count of arson and one count of murder, but was acquitted on the other arson charge. (A. 5) All of the evidence presented at the trial pointed to a felony murder. Allegedly, after having a series of disagreements with his landlord concerning rent payments, defendant set fire to his apartment building to gain revenge. In the course of that fire, a visitor to a second floor apartment, Earl Redding, died of smoke inhalation. Defendant was arrested several weeks later after giving a statement to investigators for the Newark Arson Squad.

At the sentencing on May 16, 1973, defense counsel noted that if Corbitt had pleaded to the murder charge, he would have been eligible to receive a suspended sentence or a term of years in the State Prison. (A. 6) But because he had been convicted of this offense after a jury trial, defendant was subject to the mandatory life sentence imposed for first degree or felony murder. Thus counsel argued that the murder statute was in violation of this Court's decision in *United States v. Jackson*, 390 U.S. 570 (1968), and that the judge should exercise the same powers that he would have had in the event that defendant had

chosen not to contest the charges. (A. 6) However, the judge ruled that he was "powerless" to impose any sentence except life imprisonment. (A. 7-8)

In an opinion dated September 23, 1975, the Appellate Division of the Superior Court of New Jersey rejected defendant's contention that the penalty provision of the murder statute was unconstitutional and affirmed his conviction. However, because the case clearly involved a felony murder, the Appellate Division merged the arson conviction into the murder charge. (A. 9-12)

Defendant then petitioned the Supreme Court of New Jersey to review his case. In an order dated February 18, 1976 the Court agreed to hear the case but limited its review to "the questions of the validity of the mandatory life sentence upon a jury conviction for murder." (A. 13) On October 6, 1977 the New Jersey Supreme Court held by a five to two majority that the statute was constitutional. (A. 14) Specifically, the majority held that: (1) the holding of *United States v. Jackson* did not extend to cases where there was no threat of the death penalty; (2) even if *Jackson* was applicable, the New Jersey murder statute did not "needlessly" encourage guilty pleas; and (3) the statute did not violate the Equal Protection Clause because there was a rational basis for imposing separate penalty schedules. The two dissenting justices, in separate opinions, both found the mandatory life sentence to be needless and coercive. This appeal followed.

SUMMARY OF ARGUMENT

A defendant in a criminal case may not be penalized in any manner for exercising his constitutional right to a jury

trial. This is true whether the penalty imposed is an increased sentence or the denial of sentencing alternatives. Since a defendant convicted of felony murder in New Jersey after a jury trial receives a mandatory life sentence, while a defendant who pleads to the offense and admits the same crime may receive a term of not more than 30 years in the State Prison, the murder statute clearly penalizes the defendant who insists upon his Fifth and Sixth Amendment rights to a jury trial by denying him valuable sentencing alternatives.

It makes no difference that the death penalty is not involved here as it was in *United States v. Jackson*, 390 U.S. 570 (1968). Rather, *Jackson* is merely one of a long line of cases in which this Court has held that neither courts nor legislatures may impose burdens upon the exercise of constitutional rights. Any sanction which makes assertion of a constitutional right "costly" is forbidden, even if that sanction is nothing more than the loss of one's employment for refusing to incriminate oneself, or the loss of welfare payments for exercising one's right to travel.

Moreover, this sentencing scheme cannot be justified on the theory that it is needed to facilitate plea bargaining. Although the murder statute is the only New Jersey law with separate penalty scales for those who plead guilty and those who go to trial, plea bargaining is an accepted and widespread practice within the state. Similarly, other states appear to conduct plea bargaining in homicide cases without relying on this sort of discriminatory sentencing provision. Thus the unique sentencing scheme of the New Jersey murder statute is certainly not necessary to plea bargaining.

Indeed, plea bargaining has nothing to do with this case. Plea bargaining is the practice whereby the prosecutor

offers certain sentencing concessions to a defendant in order to induce him to waive his right to a trial. But a defendant in a felony murder case in New Jersey is encouraged to plead to the offense, not because his maximum sentence exposure will be limited, but because if he goes to trial and is convicted, he must receive the maximum penalty. This is not plea bargaining, it is coercion. The murder statute does nothing to aid bargaining or negotiation, it is simply a unilateral penalty imposed only upon those persons who have exercised their Fifth and Sixth Amendment rights to a jury trial.

This statutory scheme also violates the Equal Protection Clause by establishing two penalties for the same offense, depending solely on whether the accused has insisted upon a jury trial. A defendant who pleads *non vult* in a felony murder case may receive up to 30 years in the State Prison or life imprisonment, while a defendant convicted of felony murder must receive life imprisonment. Because the classification here infringes upon the right to a jury trial, which is a fundamental constitutional right, the State of New Jersey must have a "compelling state interest" to justify the discriminatory scheme. But, no such compelling state interest exists. Indeed, even using the rational relationship test the statute must fall. While it may be permissible to extend leniency to those persons who admit their guilt, it does not follow that the defendant who insists upon his constitutional rights must be so incorrigible that only the maximum sentence would be appropriate. Rather, since the defendant who pleads to the offense is just as culpable as the defendant convicted at trial, both persons should be at least eligible for the same range of penalties. Certainly, no legitimate state purpose is served by imposing a mandatory maximum sentence upon only those persons

who have asserted their constitutional rights. Thus, this murder statute, which discriminates against those defendants convicted at a jury trial, clearly violates the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

I.

THE NEW JERSEY MURDER STATUTE PENALIZES THE EXERCISE OF ONE'S FIFTH AND SIXTH AMENDMENT RIGHTS BY IMPOSING A MANDATORY LIFE SENTENCE UPON ONLY THOSE DEFENDANTS WHO HAVE BEEN CONVICTED OF FIRST DEGREE MURDER AFTER A JURY TRIAL.

In *United States v. Jackson*, 390 U.S. 570 (1968), this Court struck down the death penalty provision of the federal kidnapping statute because it needlessly encouraged guilty pleas, while penalizing those defendants who exercised their Fifth and Sixth Amendment rights to a jury trial. The defendant would submit that the present New Jersey murder statute, as its predecessor which was struck down in *Funicello v. New Jersey*, 403 U.S. 948 (1971), is clearly unconstitutional because it too imposes a burden upon the right to a jury trial.

Under the federal kidnapping statute considered in *Jackson*, a defendant who pled guilty could receive no more than life imprisonment, while a defendant convicted at a jury trial risked the death penalty. The "inevitable effect" of this provision was, of course, to deter the assertion of Fifth

and Sixth Amendment rights, because a defendant risked his life by going to trial. 390 U.S. at 581. It did not matter that the statute may have been intended to mitigate the severity of the death penalty and that any deterrent effect on constitutional rights may have been incidental, because

> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive. *Id.* at 582. [citations omitted]

Thus, because there was no need for the death penalty provision, it was struck from the remainder of the statute. *Id.* at 582-83. Later invalidated for the same reason was the sentencing provision of the Federal Bank Robbery Act. *Pope v. United States*, 392 U.S. 651 (1968).

The *Jackson* decision called into question the validity of the New Jersey murder statute, *N.J.S.A.* 2A:113-1 to 4, which also imposed the death penalty only upon defendants convicted of first degree murder after a jury trial. In *State v. Forcella*, 52 N.J. 263, 245 A.2d 181 (1968), the Supreme Court of New Jersey upheld the statute and attempted to distinguish *Jackson.* But on appeal this Court in a memorandum opinion reversed the judgment "insofar as [it] impose[d] the death sentence." *Funicello v. New Jersey*, 403 U.S. 948 (1971). On remand the Supreme Court of New Jersey acknowledged that the death penalty provision was unconstitutional and attempted to preserve the remainder of the statute by merely excising the death penalty. *State v. Funicello*, 60 N.J. 60, 286 A.2d 55 (1972), *cert.* den. *sub nom New Jersey v. Presha*, 408 U.S. 942 (1972). Yet, notwithstanding the deletion of the death

penalty, the defendant would submit that the statute continues to be unconstitutional.

At the present time the penalty for first degree murder in New Jersey is life imprisonment, while the punishment for second degree murder is not more than 30 years in the State Prison. *N.J.S.A.* 2A:113-4. However, an accused is not indicted for either first or second degree murder, but rather for the crime of "murder," which encompasses both degrees. *State v. Williams*, 39 N.J. 471, 479, 189 A.2d 193, 197 (1963). Not until the jury renders its verdict does it designate the crime as being either first or second degree murder. *N.J.S.A.* 2A:113-2. Felony murder and premeditated murder are both considered murder in the first degree. *N.J.S.A.* 2A:113-2. Thus a defendant who goes to trial in a felony murder case and is convicted must receive the mandatory sentence of life imprisonment. *N.J.S.A.* 2A:113-4, *State v. Corbitt*, 74 N.J. 379, 378 A.2d 235 (1977); *State v. Robinson*, 139 N.J. Super. 58, 352 A.2d 587 (App. Div. 1976) certif. den. ____ N.J. ____ , ____ A.2d ____ (1977).

However, a defendant accused of felony murder may avoid this mandatory life sentence if he is willing to plead to the offense. *N.J.S.A.* 2A:113-3 provides in pertinent part:

> In no case shall the plea of guilty be received upon any indictment for murder. . .
>
> Nothing herein contained shall prevent the accused from pleading *non vult* or *nolo contendere* to the indictment; the sentence to be imposed, if such plea shall be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.

In sentencing a defendant who has pled *non vult* to the crime of murder, a judge is not to make a determination as

to the degree of the crime, but rather he has complete discretion to impose a term of not more than 30 years, the punishment for second degree murder, or life imprisonment, the penalty for first degree murder.[1] *State v. Walker*, 33 N.J. 580, 588, 166 A.2d 567, 571-72 (1957). Thus it is common for a defendant entering a *non vult* plea to set forth facts which would clearly indicate a first degree murder, but yet be sentenced to a term of years. See *e.g. State v. Hubbard*, 123 N.J. Super. 345, 351-52, 303 A.2d 87, 90 (App. Div. 1973), certif. den. 63 N.J. 325, 315 A.2d 413 (1973). On the other hand, if that defendant refuses to enter a plea but goes forward to trial and is convicted on the same facts, then he must receive a life sentence.

Therefore, even though the maximum sentence for murder is life imprisonment whether or not there had been a trial, the statute nevertheless penalizes the defendant who goes to trial by requiring that after conviction he must be sentenced by a judge who has no discretion to impose a sentence of less than life imprisonment. This statutorily imposed loss of discretion in the sentencing judge, which may mean the difference between a few years in the State Prison and life imprisonment, is a severe penalty for a defendant to pay simply because he has chosen to exercise his right to a jury trial. Obviously, a defendant in a felony murder case will be extremely reluctant to risk a trial when he can plead to the offense, admit the crime, and be eligible for a much lesser sentence. Thus, just as in *United States v. Jackson*, the statute involved here not only discourages a

[1]A plea of *non vult* or *nolo contendere* is the equivalent of a guilty plea except that it may not be used in a collateral proceeding for the same wrong. *In re Berardi*, 23 N.J. 485, 494, 129 A.2d 705, 710 (1957); *State v. Pometti*, 12 N.J. 446, 452, 97 A.2d 399, 402-03 (1953).

defendant from asserting his constitutional rights, it penalizes him if he does.

Since the *Jackson* decision it has been consistently held that a defendant may not be penalized through imposition of a more severe sentence simply because he has insisted upon a trial or has refused to acknowledge his guilt at sentencing. *Scott v. United States*, 419 F.2d 264, 268 (D.C. Cir. 1969); *Poteet v. Fauver*, 517 F.2d 393, 396 (3 Cir. 1975); *United States v. Derrick*, 519 F.2d 1, 3 (6 Cir. 1975); *United States v. Wiley*, 278 F.2d 500, 504 (7 Cir. 1960); *Hess v. United States*, 496 F.2d 936, 938 (8 Cir. 1974); *United States v. Stockwell*, 472 F.2d 1186 (9 Cir. 1973), *cert.* den. 411 U.S. 948 (1973); *People v. Young*, 20 Ill. App. 3d 891, 314 N.E.2d 280 (1974). This is true even if the penalty imposed is simply an increase in the minimum sentence. *Commonwealth v. Staley*, 229 Pa. Super. 322, 324 A.2d 393 (1974). Moreover, statutes which impose harsher sentences upon defendants convicted at jury trials have likewise been held unconstitutional in the wake of *Jackson.* See *Pope v. United States, supra; Funicello v. New Jersey, supra; Atkinson v. North Carolina*, 403 U.S. 948 (1971) rev'g *State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241 (1969); *Thomas v. Leeke*, 403 U.S. 948 (1971) [rev'g *Thomas v. Leeke*, 257 S.C. 491, 186 S.E.2d 516 (1970)]; *Springfield v. United States*, 403 F.2d 572 (D.C. Cir. 1968). For example, in *People v. Courts*, 401 Mich. 57, 257 N.W.2d 101 (1977), a defendant convicted of a motor vehicle charge was sentenced to 30 days in jail, a $100 fine, and $154 in costs, even though under state law he would have received only a $15 fine if he had pled guilty. Noting that this statutory scheme might lead some judges to penalize defendants for requesting a trial, the Michigan Supreme Court reduced defendant's sentence to a $15 fine.

257 N.W.2d at 103. Similarly, in *Voyles v. Thorneycroft*, 398 F. Supp. 706, 707 (D. Ariz. 1975), an Arizona statute which provided that a defendant who pled guilty to drunken driving would have his driver's license returned to him, while a defendant who pled not guilty would remain under suspension, was held to impose an impermissible burden on the Fifth and Sixth Amendment rights of the accused.

In the present case it does not matter that a defendant in New Jersey who pleads *non vult* may possibly receive a life sentence. What is important is that the defendant who goes to trial must receive the maximum sentence simply because he has exercised his constitutional rights. In *United States v. McCoy*, 429 F.2d 739, 743 (D.C. Cir. 1970), a judge announced that he would impose the maximum sentence of life imprisonment on anyone convicted before him of armed robbery in a jury trial. Noting that the inevitable effect of this policy would be to deter the assertion of Fifth and Sixth Amendment rights, the District of Columbia Circuit found it to be in violation of *Jackson. Id.* The New Jersey murder statute places the same sort of burden on a defendant convicted at trial by taking away the judge's discretion to impose a term of less than life imprisonment, even if such a sentence is clearly warranted.[2]

[2]If defendant Corbitt had entered a *non vult* plea it is very likely that he would have received a much less severe sentence than life imprisonment. At the time of the crime the defendant was only 22 years old and he had no prior convictions. According to the Presentence Report, Mr. Corbitt was a high school graduate who left South Carolina in 1969 "to find a new job in a better town." Prior to his arrest the defendant was employed in Newark as a bartender. Moreover, it is clear that the defendant had no intention to harm the victim, Earl Redding. Rather, after having a series of disagreements with his landlord concerning rent payments, the defendant allegedly started a trash fire in his apartment building which led to Redding's death from smoke inhalation. (See Presentence Report)

The fact that the death penalty is no longer involved does not make such a sentencing scheme proper. It is recognized that "the penalty of death is qualitatively different from a sentence of imprisonment, however long," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), and that the severity of the death penalty may require special concern for the rights of the condemned, *Furman v. Georgia*, 408 U.S. 238, 286-87 (1976), (Brennan, J., concurring). However, the defendant does not understand the *Jackson* decision to extend only to situations involving the death penalty. Rather, *United States v. Jackson* is merely one of a long line of cases in which this Court has held that neither courts nor legislatures may impose premiums on the exercise of constitutional rights.[3] *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Griffin v. California*, 380 U.S. 609, 614 (1965); *Malloy v. Hogan*, 378 U.S. 1, 8, (1964). The emphasis in all of these cases has been not on the degree of punishment possible under the applicable statute, but on the penalty placed upon the constitutional right. As this Court noted in *Spevack v. Klein*, 385 U.S. 511, 515 (1967),

> In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, [380 U.S. at 614], the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'

Thus, many of these cases invalidating statutes which

[3]An analogous line of cases has held that, where a state enacts statutes which open avenues of access to the courts, the Due Process Clause of the Fourteenth Amendment prohibits the state from then vindictively punishing those persons who exercise their rights under the statute. See *Blackledge v. Perry*, 417 U.S. 21, 25 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969).

burdened the exercise of constitutional rights have been concerned with civil, not criminal penalties. See *e.g., Dunn v. Blumstein, supra* [durational residence laws penalize right to travel]; *Gardner v. Broderick,* 392 U.S. 273 (1968) [dismissal of policeman who invokes right against self-incrimination violates Fifth Amendment]; *Harman v. Forssenius,* 380 U.S. 528 (1965) [certificate of registration in lieu of poll tax infringes upon right to vote]. Moreover, none of the criminal cases cited above have limited *Jackson* to death penalty situations. Certainly, the threat of a mandatory life sentence which is present in this case is at least as severe a burden on defendant's right to jury trial as, for example, the filing of a certificate was upon the right to vote in *Harman v. Forssenius, supra.*

Indeed, in two recent decisions this Court has inferred that in the proper circumstances it would apply *Jackson* in noncapital cases. For example, in *Ludwig v. Massachusetts,* 427 U.S. 618 (1976), this Court upheld a "two tier" system by which a defendant accused of certain crimes could receive a more severe sentence if, after having been convicted in a non-jury trial, he insisted upon a trial *de novo* before a jury. Yet, the majority opinion written by Mr. Justice Blackman was careful to distinguish *Jackson* by noting that since the same range of penalties was available at both tiers, no burden was placed upon the right to a jury trial. *Id.* at 627, n.4. In another decision, *Middendorf v. Henry,* 425 U.S. 25 (1976), the Court noted that, while it is permissible under the Uniform Code of Military Justice for a person to be subject to harsher penalties because he has requested counsel and a formal court martial, in a civilian context this same scheme would call into play the reasoning of *United States v. Jackson* that one cannot be penalized for exercising a constitutional right. *Id.* at 48, n.25. Thus it is clear that the

basic rationale of the *Jackson* decision should extend to any case where a defendant receives a significant penalty for exercising his constitutional rights, even though the criminal sanction involved might be relatively minor. *Cf. United States v. Rivera,* 427 F. Supp. 89, 92 (S.D.N.Y. 1977).

Having established that the defendant was in fact penalized for exercising his right to trial, the question that remains is whether there is a need for this type of statute or whether, in the words of *United States v. Jackson,* 390 U.S. at 582, it is "unnecessary and therefore excessive." In its opinion below the Supreme Court of New Jersey found a need for the sentencing scheme of *N.J.S.A.* 2A:113-1 *et seq.* in that ". . . encouragement of guilty pleas is at the very heart of an effective plea negotiation program." *State v. Corbitt, supra,* 74 N.J. at 396, 378 A.2d at 243-44. Yet, while encouragement of plea bargaining may be a valid governmental interest, there is simply no "need" to give a convicted defendant the maximum sentence simply because he has chosen to go to trial. This mandatory maximum sentence imosed upon a jury conviction merely serves to coerce a defendant not to assert his constitutional rights. Moreover, it is clear that plea bargaining can work without this type of discriminatory sentencing provision. Although the murder statute is the only New Jersey law which provides a separate scale of punishment for those who have gone to trial, plea bargaining is an accepted and widespread practice within the state. See *State v. Gibson,* 68 N.J. 499, 505-06, 348 A.2d 769, 772 (1975); *State v. Thomas,* 61 N.J. 314, 321, 294 A.2d 57, 61 (1972). Other states have not been forced to rely on this sort of sentencing provision in order to conduct plea bargaining in homicide cases, and inded, there appear to be few if any statutes in any jurisdiction which provide separate

punishments for those defendants who plead guilty and those who go to trial.[4] Rather, most statutes of this sort have been declared unconstitutional since the *Jackson* decision.[5] *Funicello v. New Jersey, supra*; *Voyles v. Thorneycroft, supra*; *People v. Courts, supra.* Thus, in view of the uniqueness of the sentencing provision of the New Jersey murder statute, any claim that it is "necessary" to plea bargaining must fall on its face.

Plea bargaining has, of course, been recognized as an accepted and useful tool in the administration of criminal justice. *Blackledge v. Allison,* 431 U.S. 63, 71 (1977); *Santobello v. New York,* 404 U.S. 257, 260 (1971). In a true plea bargaining situation both sides benefit; the defendant may limit his possible sentence exposure, while the

[4]The death penalty statutes approved by this Court in the last few years all appear to provide the same range of punishments, whether the conviction is a result of a guilty plea or a jury trial. See *Gregg v. Georgia,* 428 U.S. 153 (1976); *Proffit v. Florida,* 428 U.S. 242 (1976); *Jurek v. Texas,* 428 U.S. 262 (1976).

But see *State v. Weind,* 50 Ohio St. 224, 364 N.E. 2d 224 (1977), which involved the validity of the Ohio murder statute. Although that statute provided for the same range of penalties after a plea or trial, the defendant challenged its constitutionality because upon a guilty plea a judge could dismiss any aggravating circumstances, thus sparing the accused the death penalty. Noting that "... the United States' Supreme Court has never proscribed discretionary acts of mercy," the Supreme Court of Ohio upheld the statute. 364 N.E.2d at 229.

[5]Of course, in situations where there is no right to a jury trial, a state would be allowed to enact separate penalty provisions for persons who do not insist upon a formal hearing. For example, in *Raines v. Alabama,* 552 F.2d 660 (5 Cir. 1977), the Alabama Youthful Offender Act, which required a juvenile to waive a jury trial before getting the benefit of the act, was held constitutional since, pursuant to *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), there is no right to jury trial in juvenile proceedings. *Cf. Middendorf v. Henry, supra,* 425 U.S. at 48, n. 25.

State gains a prompt adjudication of guilt without the expense of a trial. *Brady v. United States,* 397 U.S. 742, 752 (1970). Accordingly, the defendant has no desire to restrict the practice in any manner. But it is the defendant's position that plea bargaining has nothing to do with the present case. Rather, plea bargaining is "a process of negotiation in which the prosecutor offers the defendant certain concessions in exchange for a guilty plea." Note, "The Unconstitutionality of Plea Bargaining" 83 Harv. L. Rev. 1387, 1389 (1970). These concessions may take the form of a recommendation of a lesser maximum sentence, a plea to a reduced charge, dismissal of other pending charges, or even, as this Court recently held, a promise not to indict under a habitual offender statute. *Bordenkircher v. Hayes,* ____ U.S. ____, ____, 98 S. Ct. 663, 668 (1978). During plea bargaining negotiations, in which both sides have relatively equal bargaining power, the State is free to use whatever leverage it might have to persuade the defendant to forego his right to trial. But at the same time the defendant retains his freedom of choice; if he turns down the bargain, he cannot be penalized by imposition of a harsher term at sentencing.

In *Bordenkircher v. Hayes, supra,* Mr. Justice Stewart, writing for the majority, compared the "give and take negotiation common in plea bargaining. . ." with ". . . the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise his legal rights. . ." ____ U.S. at ____, 98 S. Ct. at 667. Even though the prosecutor's aim in plea bargaining is to convince the defendant to give up his right to trial, as long as the accused is free to accept or reject the offer, there is no element of retaliation or punishment. ____ U.S. at ____, 98 S. Ct. at 668. On the other hand, "[t]o

punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Id.* This distinction highlights the problem with the mandatory life sentence provision of the New Jersey murder statute. A defendant in a felony murder case in New Jersey is not encouraged to plead *non vult* by the offer of a limited sentence exposure or other concessions. Instead, he is coerced into pleading to the offense by the threat of the mandatory life sentence which is automatic upon a jury conviction. Thus the murder statute does not contain the "mutuality of advantage" common to plea bargaining, *Brady v. United States, supra,* 397 U.S. at 752, nor does it aid bargaining or negotiation. The mandatory life sentence is simply a penalty levied against those persons who refuse to plead guilty. As such, it imposes the same sort of vindictive punishment as did the judge in *United States v. McCoy, supra,* who threatened to give life sentences to any defendant convicted before him at a trial.

It has often been said that the criminal justice system is replete with the making of difficult judgments and that, while a defendant may have the right to follow whatever course he desires, the Constitution does not forbid him from choosing. *Chaffin v. Stynchcombe,* 412 U.S. 17, 30 (1973); *McGautha v. California,* 402 U.S. 183, 213 (1971); *McMann v. Richardson,* 397 U.S. 759, 769 (1968). But at the same time a state may not force choices upon a defendant where the only objective of the state practice is to deter the assertion of protected rights. *Chaffin v. Stynchcombe, supra,* 412 U.S. at 32, n.20. As this Court noted in *McGautha v. California, supra,* 402 U.S. at 213, the "threshold question" is whether compelling an election between two alternatives "impairs to any appreciable extent any of the policies involved."

Using this standard, the New Jersey murder statute quite

clearly impairs the right to a jury trial. In a normal situation there is, of course, a degree of inherent coercion in the decision whether to plead guilty, for it is common for judges to extend leniency to the defendant who admits his guilt. *Brady v. United States, supra,* 397 U.S. at 752; *State v. Forcella, supra,* 52 N.J. at 276, 245 A.2d at 187. Yet, a defendant who goes to trial pays no penalty for exercising his rights since, if convicted, he is still eligible to receive any sentence allowed by the statute. But in New Jersey a defendant in a felony murder case knows that in order to get a jury trial, he must forfeit the opportunity to receive a sentence of less than life imprisonment. Certainly, this situation does not reflect the inherent coercion of the criminal justice system, nor does the defendant have the freedom of choice contemplated by cases such as *Chaffin v. Stynchcombe, Colten v. Kentucky,* 407 U.S. 104 (1972), or *McGautha v. California.* Rather, the mandatory life sentence provision of the New Jersey murder statute is a unique and vindictive penalty imposed only upon those defendants who have exercised their constitutional right to a jury trial. As such the defendant would submit that it imposes an intolerable burden upon one's Fifth and Sixth Amendment rights.

II.
THE SENTENCING PROVISION OF THE NEW JERSEY MURDER STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY ESTABLISHING SEPARATE SCALES OF PUNISHMENT FOR THE SAME OFFENSE DEPENDING ON WHETHER THE ACCUSED HAS EXERCISED HIS RIGHT TO A TRIAL.

As noted, the New Jersey murder statute has two scales of punishment for the same offense. If a defendant pleads *non vult* and admits a felony murder, he may be sentenced to not more than 30 years in prison or to life imprisonment. But if that person is convicted of felony murder after a trial, he receives the mandatory sentence of life imprisonment.[6] It is submitted that this scheme of different punishments for the same offense, based solely on whether the defendant has gone to trial, violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause does not prevent a state from classifying persons into separate groups, it merely requires that such classifications be reasonably related to a permissible state purpose. *San Antonio Independent School District v. Rodriquez,* 411 U.S. 1, 17 (1973); *McGinnis v. Royster,* 410 U.S. 263, 270 (1973); *Dandridge v. Williams,* 397 U.S. 471, 487 (1970). But where the nature of a statutory classification is such that it discriminates against those persons who have exercised a fundamental constitutional right, the Equal Protection Clause requires that there be a "compelling state interest" to justify the classification. *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 256-58 (1974); *Dunn v. Blumstein, supra,* 405 U.S. at 337-39; *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969). This "compelling interest" test is applicable even where a classification has not been shown to deter the exercise of the constitutional right, but merely serves to penalize it. *Dunn v. Blumstein, supra,* 405 U.S. at 339-40; *Shapiro v. Thompson, supra,* 394 U.S. at 634.

[6]The State had argued below that there was a difference between a conviction for "murder" and a conviction for felony murder. 74 N.J. at 400, 378 A.2d at 246. The Supreme Court of New Jersey did not find this to be a "fully satisfactory basis for meeting the defendant's argument," and thus chose to address the question more directly. 74 N.J. at 401, 378 A.2d at 246. In any event, this distinction would not matter in the present case. Although *N.J.S.A.* 2A:113-2 requires a jury returning a guilty verdict to "designate by their verdict whether it be murder in the first degree or in the second degree," *State v. Greely,* 11 N.J. 485, 489-91, 95 A.2d 1, 3-4 (1953), the jury in the present case simply found appellant guilty of "murder." Of course, since the case was tried on a felony murder basis, the conviction was deemed to be one of first-degree murder.

In its opinion below, the Supreme Court of New Jersey held that the "compelling state interest" test was inapplicable in this case. *State v. Corbitt, supra,* 74 N.J. at 401, 378 A.2d at 246. Rather, the court found that

> . . . in the area of classification of criminal or penal offenders for purposes of penalty or punishment the Legislature may provide for differences of treatment as long as there is some rational connection between the classification and a proper legislative purpose. *Id.*

Because the murder statute served to "ameliorat[e] the rigor of life imprisonment for those . . . willing to acknowledge their crime," to "facilitat[e]. . . plea negotiations in homicide cases," and to "conserv[e] . . . scarce judicial and prosecutorial resources . . . ," it was held to be rationally related to legitimate state goals. 74 N.J. at 402, 378 A.2d at 246-47.

But the defendant would submit that, since the classification here infringes upon the exercise of a valued constitutional right, the "compelling state interest" test should be applied. Quite clearly the murder statute does not classify defendants according to their personal or penal status, but on whether they have exercised their constitutional right to a jury trial. A defendant convicted of first degree murder at a jury trial receives a mandatory life sentence, while a defendant whose convictions rests upon a plea is eligible for a term of years in the State Prison.

Moreover, it is equally clear that the right to a jury trial is "fundamental to the American system of justice." *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968). Indeed, within the right to a jury trial are included the rights to remain silent, *Malloy v. Hogan, supra,* 378 U.S. at 6, to confront one's accusers, *Pointer v. Texas,* 380 U.S. 400, 403 (1965), to present witnesses in one's defense, *Washington v. Texas,* 388 U.S. 14, 19 (1967), to be represented by counsel, *Gideon v. Wainwright,* 372 U.S. 335, 342 (1963), and to be convicted by proof beyond a reasonable doubt, *In re Winship,* 397 U.S. 358, 364 (1970), all of which have been recognized as being fundamental rights. *Duncan v. Louisiana, supra,* 391 U.S. at 148-50. Thus, use of the "rational relationship" test would be totally inappropriate in the present situation.

The question that remains is whether New Jersey has a "compelling interest" in maintaining this sort of discriminatory sentencing provision. Certainly, none of the reasons advanced by the Supreme Court of New Jersey to justify the provision could be considered compelling. While it is commendable that the statute serves to "ameliorat[e] the rigor of life imprisonment for those . . . willing to acknowledge their crime," the State has no compelling interest in not extending the same sentencing alternatives to persons convicted at trial. Although the statute may serve to "facilitat[e] plea negotiations in . . . homicide cases," such a disparate scheme is clearly not necessary to plea bargaining. The fact that the statute may "conserv[e]. . . scarce judicial and prosecutorial resources" is irrelevant since expense has never been recognized as a justification for limiting the constitutional protections. *Griffin v. Illinois,* 351 U.S. 12, 18 (1956).

Yet, even if this Court is to apply the rational relationship test, the defendant would still submit that the statute must fall. Of course, a state may provide for differences in treatment of penal offenders if it has a rational basis for so doing. *McGinnis v.Royster, supra.* Generally, the courts have found a rational basis for differences in treatment where the classifications involved are based upon the personal or penal status of the offender. See *e.g. Oyler v. Boles,* 368 U.S. 448, 455-56 (1962); *Finley v. California,* 222 U.S. 28, 31 (1911); *State v. Fearick,* 69 N.J. 32, 38, 350 A.2d 227, 230 (1976) [mandatory jail sentence imposed upon only those suspended drivers involved in auto accidents resulting in personal injuries]; *State in the Interest of K.V.N.,* 116 N.J. Super. 580, 283 A.2d 337 (App. Div. 1971), aff'd 60 N.J. 517, 291 A.2d 577 (1972) [juvenile offenders may receive longer sentences than those prosecuted as adults]. However, where the classification is based upon "unreasoned distinctions" such as the offender's financial status, then the Equal Protection Clause is violated. *Mayer v. Chicago,* 404 U.S. 189, 195-96 (1971); *Rinaldi v. Yeager,* 384 U.S. 305, 310 (1966). See also *People v. Calvaresi,* 188 Colo. 277, 534 P.2d 316 (1975); *City of Aberneen v. Meidinger,* 233 N.W. 2d 331 (S.D. 1975); *Olsen v. Delmore,* 48 Wash. 2d 545, 295 P.2d 324 (1956).

In *Pruett v. Texas,* 468 F.2d 51 (5 Cir. 1972), aff'd *en banc* 470 F.2d 1182 (1973), aff'd mem. *sub nom Texas v. Pruett,* 414 U.S. 802 (1973), a defendant challenged a Texas statute which operated to deny "good time" credit for those prisoners who had chosen to appeal their convictions. The Fifth Circuit held, and this Court agreed, that the Equal Protection Clause did not allow the State of Texas to impose such a premium upon a defendant's right to appeal. 468 F.2d

at 55. Since that state had provided a process by which defendants could appeal their convictions, it was required to keep that process free of "unreasoned distinctions" which could "only impede open and equal access to the courts." *Id.* at 56. Because the denial of good time credits served to penalize a prisoner's right to appeal, the statute was held to be in violation of the Fourteenth Amendment. *Id.*

The New Jersey murder statute relies on this same sort of "unreasoned distinction" in imposing different penalties for felony murder, depending upon whether the conviction is a result of a plea of *non vult* or a jury trial. Even if one is to accept the contention that the defendant who pleads to the offense is a more fit subject for rehabilitation and thus may be treated more leniently, *State v. Poteet,* 61 N.J. 493, 496-97, 295 A.2d 857, 859 (1972), it does not follow that the defendant who insists upon his constitutional rights must be so recalcitrant that only the maximum sentence would be appropriate. Rather, since a defendant who pleads *non vult* in a felony murder case is every bit as culpable as the defendant convicted after a trial, there is no reason why both should not at least be eligible for the same range of sentences. Certainly there is no legitimate state purpose in discouraging trials, nor is there a rational basis for discriminating against those who have exercised their constitutional rights. Thus, in the absence of either a compelling state interest or a rational basis to justify the discriminatory sentencing provisions of *N.J.S.A.* 2A:113-1 to 4, the defendant would submit that it stands in violation of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons the appellant respectfully requests that the decision of the Supreme Court of New Jersey be reversed.

Respectfully submitted,

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ADDENDUM

UNITED STATES CONSTITUTION

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> * * *